

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Stephen DiFiore	Team: Squad #04	CCRB Case #: 202208267	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 01/13/2022 9:32 PM	Location of Incident: § 87(2)(b) § 87(2)(b)	Precinct: 70	18 Mo. SOL 7/13/2023	EO SOL 7/13/2023	
Date/Time CV Reported Thu, 11/10/2022 12:00 AM	CV Reported At: CCRB	How CV Reported: Mail	Date/Time Received at CCRB Fri, 11/18/2022 1:44 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. PO Alexander Caballery	21951	962284	070 PCT
2. PO Anthony Carolei	11381	961670	070 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. PO Justine Ezeir	15570	960513	070 PCT
2. SGT Larry Simpson	04899	952243	070 PCT
3. PO Ener Purisic	07400	964713	070 PCT
4. PO John Baggs	21920	959467	070 PCT
5. PO Jair Flores	22120	959637	070 PCT
6. PO Marc Fontana	16274	951741	070 PCT
7. PO Adnan Hussain	00333	961531	070 PCT

Officer(s)	Allegation	Investigator Recommendation
A. PO Anthony Carolei	Abuse: Police Officer Anthony Carolei entered § 87(2)(b) in Brooklyn.	§ 87(2)(b)
B. PO Alexander Caballery	Abuse: Police Officer Alexander Caballery entered § 87(2)(b) in Brooklyn.	§ 87(2)(b)
C. PO Alexander Caballery	Abuse: Police Officer Alexander Caballery searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
D. PO Anthony Carolei	Abuse: Police Officer Anthony Carolei searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
E. PO Anthony Carolei	Abuse: Police Officer Anthony Carolei arrested § 87(2)(b) unlawfully.	§ 87(2)(b)
F. PO Alexander Caballery	Abuse: Police Officer Alexander Caballery entered § 87(2)(b) in Brooklyn.	§ 87(2)(b)
G. PO Anthony Carolei	Abuse: Police Officer Anthony Carolei entered § 87(2)(b) in Brooklyn.	§ 87(2)(b)
H. PO Alexander Caballery	Abuse: Police Officer Alexander Caballery arrested § 87(2)(b) unlawfully.	§ 87(2)(b)

Officer(s)	Allegation	Investigator Recommendation
I.P.O Alexander Caballery	Abuse: Police Officer Alexander Caballery arrested § 87(2)(b) unlawfully.	

Case Summary

On November 10, 2022, § 87(2)(b) filed the following complaint by mailing a letter to the CCRB, which was received on November 18, 2022, on his own behalf and on behalf of § 87(2)(b) and § 87(2)(b).

On January 13, 2022, at approximately 9:32 p.m., PO Anthony Carolei and PO Alexander Caballery entered § 87(2)(b) § 87(2)(b) in Brooklyn (**Allegations A-B: Abuse of Authority**, § 87(2)(g) PO Carolei and PO Caballery broadly searched throughout the apartment and thoroughly searched the bedroom (**Allegations C-D: Abuse of Authority**, § 87(2)(g) PO Carolei then arrested § 87(2)(b) without probable cause on charges of trespassing, criminal mischief, and burglary (**Allegation E: Abuse of Authority**, § 87(2)(g) (Board Review 01).

Shortly afterwards, § 87(2)(b) and § 87(2)(b) arrived at the apartment. PO Caballery and PO Carolei re-entered the apartment (**Allegations F-G: Abuse of Authority**, § 87(2)(g) PO Caballery arrested § 87(2)(b) and § 87(2)(b) without probable cause, also on charges of trespassing, criminal mischief, and burglary in addition to possession of various contraband (**Allegations H-I: Abuse of Authority**, § 87(2)(g) (Board Review 01-02).

The CCRB obtained BWC for this incident (Board Review 03-04, summarized in Board Review 05-06). All references to video refer to the video player's timestamp and not to the on-screen timestamp.

This complaint was filed nearly ten months after the incident date. In addition to the ten-month delay in filing the complaint, this investigation was further delayed by attempts to schedule § 87(2)(b) for an appearance as § 87(2)(b) was incarcerated in Rikers Island when the investigation began. As a result, the investigation did not obtain a sworn statement from § 87(2)(b) until approximately 13 months after the incident date.

Findings and Recommendations

Allegation (A) Abuse of Authority: Police Officer Anthony Carolei entered § 87(2)(b) in Brooklyn.

Allegation (B) Abuse of Authority: Police Officer Alexander Caballery entered § 87(2)(b) in Brooklyn.

Allegation (C) Abuse of Authority: Police Officer Alexander Caballery searched § 87(2)(b) in Brooklyn.

Allegation (D) Abuse of Authority: Police Officer Anthony Carolei searched § 87(2)(b) in Brooklyn.

§ 87(2)(b) testified (Board Review 07) that he had dropped § 87(2)(b) off at his apartment at § 87(2)(b) at around 9:00 p.m. He then left and returned at around 10:00 p.m. to find that the door to the apartment was open. He took a few steps inside when PO Caballery and PO Carolei stepped inside and immediately handcuffed him. The officers did not ask for his consent to enter, and § 87(2)(b) had not said anything to the officers. § 87(2)(b) then told the officers that he lives there. The officers informed him that he was under arrest because he was not supposed to be there. He later learned that officers had arrived earlier, entered the apartment, and arrested § 87(2)(b) prior to his return. When he returned to the residence later, he saw that many items inside the apartment had been moved around as if the apartment had been searched.

Prior to officers' arrival, the owner of the building, known only to the investigation as § 87(2)(b) called 911 to report a squatter inside § 87(2)(b) § 87(2)(b) (Board Review 08, page 2). No further information was provided prior to officers going to the location.

PO Caballery's second BWC video captures the events leading up to PO Caballery and PO Carolei initially entering the apartment (Board Review 09). § 87(2)(b) tells the officers that they

can forcibly enter any apartment with a “V” spray-painted on it.

At 02:55, PO Caballery, PO Carolei, and § 87(2)(b) gather around § 87(2)(b) and knock. When § 87(2)(b) answers, PO Carolei walks inside without exchanging any words with her. Right after he walks in, he asks § 87(2)(b) if anyone else is there, and she confirms that there is not. Officers then do a quick walkthrough of the apartment, checking mostly in general areas. At 05:25, PO Caballery enters a bedroom. He looks under the bed sheets and inside dresser drawers. At 06:38, PO Caballery and PO Carolei speak. PO Caballery says, “There’s probably shit in here.” PO Carolei says, “That’s what I’m saying.” PO Caballery says, “I see...” PO Carolei says, “220? [Penal Law § 220 deals with offenses relating to criminal possession of controlled substances]” PO Caballery says, “I mean, things indicative of 220, but just a look around.” At this point, PO Carolei looks under the bed sheets. PO Caballery looks under the bed sheets closer to the headboard as PO Carolei looks in a side table and around the headboard as well. At 07:05, PO Caballery searches again in the dresser drawers and inside two bags on top of the dresser.

Sgt. Simpson’s second BWC video (Board Review 10, from the beginning) and PO Ezeir’s first BWC video (Board Review 11, from the beginning) show that Sgt. Simpson remained outside with two other officers when PO Caballery and PO Carolei were entering the apartment.

PO Carolei testified over 15 months after the incident, largely due to the initial delays to the investigation (Board Review 12). He received a 911 call regarding trespassing at the location and responded to the scene with PO Caballery, and spoke with § 87(2)(b) who told him that there were trespassers in § 87(2)(b). PO Carolei acknowledged entering the apartment as soon as § 87(2)(b) opened the door. He did not inquire further before entering because he already had a complainant alleging a trespass. He entered to ascertain if there were any safety hazards, as he did not know how many people were inside or if there were weapons or criminal activity. PO Carolei could not see into the apartment from outside.

PO Carolei denied seeing any evidence of drug use inside the apartment. PO Carolei nonetheless searched the bedroom for drugs and weapons. Upon review of his video, he did not know why he said, “That’s what I’m saying” in response to PO Caballery saying, “I think there’s shit in here.” Asked if he knew what possible evidence of narcotics possession that PO Caballery drew his attention to, PO Carolei said he might have been talking about drug paraphernalia, but he did not himself remember if he saw any drug paraphernalia in the apartment.

PO Caballery also testified over 15 months after the incident (Board Review 13). PO Caballery testified consistent with PO Carolei’s testimony, but noted that when searching the bedroom, he saw a single pipe with marijuana inside it and a single plastic bag indicative of packaging drugs.

Payton v. New York, 445 U.S. 573 (1980), holds that “searches and seizures inside a home without a warrant are presumptively unreasonable” (Board Review 14).

People v. McBride, 14 N.Y.3d 440 (2010), holds that “it is axiomatic that warrantless entries into a home to make an arrest are presumptively unreasonable” (internal quotes omitted). However, *McBride* also outlined several factors in determining whether exigent circumstances are present, such as the gravity or violent nature of the offense to be charged, whether the suspect is believed to be armed, a clear showing of probable cause, reason to believe that the suspect is in the premises, likelihood of escape, and the peaceful circumstances of entry. While this list of factors is not exhaustive, the Court of Appeals made it clear that there must ultimately be an “urgent” need justifying a warrantless entry to make an arrest (Board Review 15).

PO Carolei testified that he initially entered immediately without any further inquiry because § 87(2)(b) was already under arrest based on § 87(2)(b) in-person report of trespassing and due to the safety hazards that could arise from other people being inside the apartment. PO Caballery testified that officers entered to address any possible safety hazards. As noted below, officers lacked probable cause to believe that § 87(2)(b) was trespassing. The possibility of other people within the apartment was also an insufficient justification for entering for similar reasons, as any possible occupants also could not have reasonably been believed to be engaged in criminal conduct,

particularly conduct that would require immediate entry. At most, § 87(2)(b) was suspected of third-degree trespassing, a non-violent misdemeanor, at the time of the entry. The officers further cited no basis for believing that anyone was armed, and in fact noted that they did not know if anyone was armed. They also could not see into the apartment itself and as such would not be able to observe any visible safety threats. Moreover, because the apartment was on the third floor, and multiple officers remained outside during the entry, the likelihood of escape for anyone inside the apartment was negligible. § 87(2)(g)

PO Carolei and PO Caballery both acknowledged that the search of the bedroom was, in part, to find contraband. PO Carolei testified that he was checking to make sure there were no weapons in the area, and PO Caballery testified that he saw evidence of drugs. Despite PO Carolei's testimony, BWC makes it abundantly clear that he was searching for narcotics, as he referenced Penal Law Section 220 before the search. Neither PO Carolei nor PO Caballery referenced any reason for suspecting drugs to be present in the apartment beyond PO Caballery's observation of a single pipe containing marijuana and a plastic bag, § 87(2)(g)

By searching in the containers within the bedroom, PO Carolei and PO Caballery went well beyond the scope of a mere security sweep. § 87(2)(g)

Allegation (F) Abuse of Authority: Police Officer Alexander Caballery entered § 87(2)(b) in Brooklyn.

Allegation (G) Abuse of Authority: Police Officer Anthony Carolei entered § 87(2)(b) in Brooklyn.

It is undisputed that PO Carolei and PO Caballery re-entered the apartment after returning to the location and observing § 87(2)(b) walk inside. It is further undisputed that officers never asked for § 87(2)(b) consent to enter.

PO Caballery's third BWC captures the moment officer re-entered the apartment (Board Review 16). At 01:25, officers are following § 87(2)(b) up the stairs to § 87(2)(b) and find him calling out to § 87(2)(b) from outside. He then enters the apartment with § 87(2)(b). PO Caballery asks § 87(2)(b) who lives there, and he responds that he lives there with his brother. As PO Caballery approaches closer, § 87(2)(b) says, "No, you can't come in." PO Caballery enters the apartment with PO Carolei and asserts that § 87(2)(b) does not live there. § 87(2)(b) says that he has paperwork showing that he lives there.

PO Carolei and PO Caballery consistently testified that there was no reason for entering the apartment other than to arrest § 87(2)(b). They further testified that they did not need § 87(2)(b) consent to enter the apartment because they already had § 87(2)(b) consent and § 87(2)(b) had already stated that § 87(2)(b) was not allowed to be there.

In *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978) the Court held, "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present" (Board Review 17).

It is undisputed that when officers returned to the location, they entered the apartment solely for the purpose of arresting § 87(2)(b). Though § 87(2)(b) had given the officers consent to enter the apartment, the officers also needed § 87(2)(b) consent because he had indicated that he lived there at the time. At no point did officers ever get consent, and § 87(2)(b) specifically denied them entry. As officers entered the apartment without the consent of all parties solely for the purpose of making an arrest, § 87(2)(g)

Allegation (E) Abuse of Authority: Police Officer Anthony Carolei arrested § 87(2)(b) unlawfully.

Allegation (H) Abuse of Authority: Police Officer Alexander Caballery arrested § 87(2)(b) unlawfully.

Allegation (I) Abuse of Authority: Police Officer Alexander Caballery arrested § 87(2)(b) unlawfully.

It is undisputed that § 87(2)(b), § 87(2)(b) and § 87(2)(b) were each arrested for trespassing, burglary, and criminal mischief. § 87(2)(b) was also charged with criminal possession of a controlled substance and § 87(2)(b) was also charged with possession of burglar tools (Board Review 01-02). It is further undisputed that officers found a wire cutter and a quantity of a controlled substance upon searching § 87(2)(b) and § 87(2)(b) respectively, during searches incident to their arrests. However, because officers did not discover these items until after the initiation of the arrests, the investigation did not consider these charges in the analysis of these allegations. Because PO Carolei took responsibility for the arrest of § 87(2)(b) and PO Caballery took responsibility for the arrests of § 87(2)(b) and § 87(2)(b) the investigation pleaded these allegations accordingly.

PO Caballery's second BWC video captures the conversations leading up to the arrests of § 87(2)(b), § 87(2)(b) and § 87(2)(b) (Board Review 09). At 00:17, the owner of the building, § 87(2)(b) approaches a group of officers. There is no audio capturing their initial conversation, but PO Carolei appears to be doing most of the talking with § 87(2)(b) who is focused on PO Carolei the whole time. Once audio begins, all conversation between § 87(2)(b) and the officers is audible until the officers enter the apartment. At no point during this period do the officers ever attempt to ascertain how long the alleged squatter had been inside § 87(2)(b). At 02:55, PO Caballery also steps inside after PO Carolei and asks § 87(2)(b) if she lives there, and she confirms that she does.

PO Caballery's third BWC captures officers arresting § 87(2)(b) and § 87(2)(b) (Board Review 16). At 01:36, PO Caballery asks § 87(2)(b) who lives there, and he responds that he lives there with his brother. As PO Caballery walks under the frame of the door and asserts that § 87(2)(b) does not live there. § 87(2)(b) says that he has paperwork showing that he lives there. At no point prior to his arrest does § 87(2)(b) or any officer discuss how long § 87(2)(b) had been living there.

PO Carolei testified that § 87(2)(b) never advised the officers for how long the trespassers were there. PO Carolei proceeded based solely on § 87(2)(b) claim that the occupants were not allowed to be there. It was his own decision to arrest § 87(2)(b). PO Carolei affirmed that when he saw § 87(2)(b) enter the apartment later, PO Caballery asked § 87(2)(b) who lives in the apartment, and § 87(2)(b) responded that he lives there. Although § 87(2)(b) claimed he lived there, he was still trespassing because § 87(2)(b) said he was not allowed to be there. § 87(2)(b) never said how long he had been living there, and no one asked him if it had been more than 30 days. There was no attempt to verify whether § 87(2)(b) lived there because § 87(2)(b) word was enough to arrest § 87(2)(b). PO Carolei did not remember if there were any reasons beyond the landlord's claims that he did not allow § 87(2)(b) a chance to prove that he lived there. PO Carolei did not know why they were all charged with criminal mischief but believed the most likely reason was the damage to the door. PO Carolei did not remember how he learned the door was damaged.

PO Caballery claimed that § 87(2)(b) told the officers that the trespassers had not been there for 30 days but did not remember when he said this. He further testified that when officers arrested § 87(2)(b) he claimed to have been living there for a year. PO Caballery knew this to be untrue because he had arrested § 87(2)(b) in September of 2021, and § 87(2)(b) had not provided

this as his address. PO Caballery confirmed that the decisions to arrest § 87(2)(b) and § 87(2)(b) were his own. PO Caballery testified that § 87(2)(b) had claimed that the door's lock was damaged. All three people were charged with criminal mischief and burglary because PO Caballery could not determine which of the three of them broke the lock.

Both officers also consistently testified that § 87(2)(b) informed them that he has had ongoing problems with squatters in the building breaking into apartments.

Based on video evidence, the investigation determined that § 87(2)(b) never alleged that he had been living there for a year as PO Caballery had claimed. Furthermore, the investigation determined that officers did not ascertain from § 87(2)(b) how long any occupant had been living at the location for the following reasons. During the audible portion of video footage, no officer ever had this conversation with § 87(2)(b) prior to initiating the arrest of § 87(2)(b). The investigation considered the possibility that they discussed this during the non-audible conversation that takes place in the BWC's one-minute buffer period. However, during that portion of the video, PO Carolei appears to be doing nearly all the talking, and he specifically denied in his testimony that he had any discussion about how long the occupants had been there.

NY Penal Law § 140.10(a) states, "A person is guilty of criminal trespass in the third degree when he **knowingly** enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders" (Board Review 18, emphasis added).

NY Penal Law § 140.20 states, "A person is guilty of burglary in the third degree when he **knowingly** enters or remains unlawfully in a building with intent to commit a crime therein" (Board Review 19, emphasis added).

NY Penal Law § 145.05 states, "A person is guilty of criminal mischief in the third degree when, with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she damages property of another person in an amount exceeding two hundred fifty dollars" (Board Review 20).

In *People v. Basch*, 365 N.Y.S.2d 836 (1975), the Court of Appeals held, "A person who enters upon premises accidentally, or who **honestly believes that he is licensed or privileged to enter**, is not guilty of any degree of criminal trespass" (Board Review 21, internal quotes omitted, emphasis added).

NY Real Property Actions and Proceedings Law (RPAPL) § 711 states, "A tenant shall include an occupant of one or more rooms in a rooming house or a resident, not including a transient occupant, of one or more rooms in a hotel who has been in possession **for thirty consecutive days or longer**. No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding" (Board Review 22, emphasis added).

Both § 87(2)(b) and § 87(2)(b) told the PO Carolei and PO Caballery that they lived there, with § 87(2)(b) offering to provide evidence of his residency. Under the precedent set in *Basch*, the issue of whether a person honestly believes he is allowed to occupy a premises is crucial to a charge of criminal trespass. Neither officer ever inquired further to determine the validity of § 87(2)(b) or § 87(2)(b) claims of legal occupancy and instead appeared only to act based on § 87(2)(b) verbal accusations. As noted above, the investigation determined that officers did not even ascertain how long the occupants had been at the location when they arrested them, which is critical to establishing whether or not § 87(2)(b) and § 87(2)(b) were tenants under the RPAPL. Crucially, § 87(2)(b) initial indifference to officers on scene and his assertion that he had proof of residence would each suggest that he did not *knowingly* occupy the premises without the authority to do so as is required to justify a charge of criminal trespass. The same could be said for § 87(2)(b) who, as noted in the analysis of **Allegations A-B**, quickly opened the door to the apartment upon hearing someone outside. This innocuous, non-evasive behavior is inconsistent with suspicious or illegal activity and is consistent with the behavior of a person who honestly believes that they are allowed to be there. § 87(2)(g)

§ 87(2)(g)

Civilian and Officer CCRB Histories

- [illegible]

- § 87(2)(g)
- 202106566 involved a substantiated allegation of failure to provide RTKA card against PO Carolei. The Board recommended formalized training and the NYPD imposed formalized training.
- PO Carolei is currently the subject of two allegations in one other open case. The investigation into these allegations is ongoing.
- § 87(2)(g)
- PO Caballery has been a member of service for six years and has been a subject in six other CCRB complaints and 14 other allegations, of which one was substantiated:
 - 202106566 involved a substantiated allegation of failure to provide RTKA card against PO Caballery. The Board recommended formalized training and the NYPD imposed formalized training.
 - PO Caballery is currently the subject of two allegations in one other open case. The investigation into these allegations is ongoing.
 - § 87(2)(g)

Mediation, Civil, and Criminal Histories

- This complaint was not suitable for mediation.
- § 87(2)(b) filed a Notice of Claim with the City of New York claiming psychological distress, pain, suffering, and stress and seeking ten million dollars as redress (Board Review 26). On June 18, 2023, § 87(2)(b) attorney affirmed that the City either has not conducted a 50H hearing or it was conducted, and he did not receive the transcript. He advised he would provide it to the investigation upon receipt. He provided a copy of the lawsuit itself to the investigation (Board Review 27, pages 10-12).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Squad: 4

Investigator: <u>Stephen J. DiFiore</u>	Inv. <u>Stephen DiFiore</u>	<u>August 24, 2023</u>
Signature	Print Title & Name	Date

Squad Leader: Raquel Velasquez IM Raquel Velasquez 8//2023
Signature Print Title & Name Date

Reviewer: _____
Signature Print Title & Name Date